No. 93-102

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOHN B. MATHES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether coerced testimony in a criminal grand jury investigation, unlawfully obtained and used by IRS, should be excluded in a later civil tax proceeding as violative of the taxpayer's rights under the Fourth and Fifth Amendments to the Constitution.

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JOHN B. MATHES, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the Judgment of the District Court affirmed per curiam by the United States Court of Appeals for the Eleventh Circuit on April 15, 1993.

OPINIONS BELOW

The U.S. Court of Appeals for the Eleventh Circuit rendered a per curiam opinion affirming the Judgment of the U.S. District Court for the Middle District of Florida, a copy of which appears on Appendix B to this petition. The opinion has not yet been reported. The foregoing

opinion affirmed without comment the opinion of the U.S. District Court for the Middle District of Florida designated as Order on the Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment dated June 22, 1992, a copy of which appears in Appendix A to this petition. This opinion has not yet been reported. A copy of the Final Judgment of the U.S. District Court for the Middle District of Florida dated November 6, 1992 appears in Appendix C to this Petition. This opinion also has not yet been reported. A copy of the memorandum decision in Mathes 1 appears in Appendix D to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the U.S. District Court for the Middle District of Florida was entered on November 6, 1992 and was affirmed by the U.S. Court of Appeal for

the Eleventh Circuit by per curiam opinion dated April 15, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U.S.C.A. Const., Amend 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const., Amend 5:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fla. Const. Art. I, §12:

Searches and seizures.--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Fla. Const. Art. I, §23.

> Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Statutory Provisions

Florida Statutes 905.27 (quoted in full in Appendix E).

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION OF THE COURT BELOW

On August 10, 1988, Respondent filed a Complaint against Petitioner to reduce to Judgment an assessment for income taxes for the year 1977 (Mathes 2). Petitioner filed an Answer and Affirmative Defenses alleging, inter alia, that the basis for the assessment (Petitioner's testimony before a Florida State Grand Jury) should be excluded as it had been unlawfully

obtained and utilized. Jurisdiction of the action was conferred upon the District Court pursuant to 28 U.S.C. §1340 and 1345.

Pending at this time in the same court was an action brought by Petitioner against Respondent seeking to enjoin Respondent from enforcing its tax assessment against Petitioner. (Mathes 1).

The instant action (Mathes 2) was abated by the District Court until conclusion of the appeal in Mathes 1. On May 22, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the Judgment of the District Court as to the denial of injunctive relief and remanded the cause to vacate the District Court Conclusion of Law finding the subject tax assessment to be valid and enforceable.

Upon conclusion of the appeal in Mathes 1, the parties filed respective Motions for Summary Judgment in Mathes 2.

On June 22, the District Court granted Respondent's Motion for Summary Judgment and Judgment was entered against Petitioner on June 26, 1992. Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on July 16, 1992. Due to an error in the form of the Judgment, the District Court entered a new Final Judgment against Petitioner on November 6, 1992. On April 15, 1993, the Court of Appeals entered a per curiam opinion affirming the District Court's Judgment. Petitioner has timely filed this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

II. STATEMENT OF THE FACTS

The facts in this case are undisputed. Petitioner and Respondent adopted the Findings of Fact included in the District Court's opinions in Mathes 2. (Appendix

A). Some time prior to July 20, 1978, Petitioner was subpoenaed to testify before the Florida Third Statewide Grand Jury. Although Petitioner was granted immunity, he refused to testify. Predicated on that refusal, Petitioner was incarcerated pursuant to an Order of Civil Contempt. The Contempt Order was open-ended and Petitioner was to remain in jail until he appeared and testified before the Grand Jury and answered questions put to him. On July 20, 1978, Petitioner, seeking to purge himself of contempt, gave a statement under oath to the designated legal advisor for the Grand Jury and answered all questions put to him. Later Petitioner testified before the Grand Jury; his testimony was substantially the same as the statement given on July 20, 1978.

Although no order from any court, federal or state, releasing Petitioner's

testimony from its statutory protection of secrecy was applied for or entered, a copy of the transcription of the July 20, 1978 grand jury statement came into the hands of agents for the Internal Revenue Service. The statement was provided to IRS by an officer with the St. Petersburg, Florida Police Department. The IRS agents receiving the information were aware that the statement was protected grand jury testimony.

In his statement, Petitioner had admitted to the receipt of income derived from the sale of marijuana on or about November, 1977. Based solely upon Petitioner's grand jury testimony, IRS assessed taxes, penalties and interest for the year 1977 against Petitioner. IRS had no basis independent of Petitioner's testimony for the subject assessment. Florida Statutes 905.27(1) specifically

makes the disclosure of grand jury testimony by the state officer unlawful and Florida Statutes 905.27(2) specifically makes the use by any person or entity, including the IRS, absent a prior judicial disclosure order, a crime under Florida state law.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in the instant case should be reviewed by this Court because its effect is to permit and encourage IRS to become a lawbreaker to exact collection of taxes; such conduct violates the Fourth and Fifth Amendments to the Constitution of the United States. This Court's supervisory power to suppress evidence that the government has obtained and used unconstitutionally or through the commission of unlawful acts must be

exercised. As this Court stated in United States vs. Janis, 428 U.S. 433 (1976), the "prime purpose," if not the "sole purpose" of the exclusionary rule, "is to deter future unlawful police conduct." As stated by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928) at page 485:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. ... Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. ... Against that pernicious doctrine this Court should resolutely set its face.

The St. Petersburg police officer and IRS agents knew that Petitioner had been granted immunity from criminal prosecution, knew or should have known that coerced grand jury testimony could not form the basis for a criminal proceeding and that

the only possible use of the testimony would be to impose civil liability in a tax proceeding. They likewise knew that Petitioner's testimony was protected from disclosure by statute and knew or should have known that its use by IRS without a court disclosure order would involve the commission of a state crime by IRS agents and would violate Petitioner's rights under the Fourth and Fifth Amendments. Respondent here had the right to petition the court for disclosure of Petitioner's statement and request permission to use the statement for a tax assessment before use. Respondent chose not to pursue this method, perhaps, because it knew that its petition would be denied. Both the state and federal government engaged in lawbreaking activities to enforce civil sanctions against an individual who was granted immunity from criminal prosecution in order

to force him to testify against himself and others.

Petitioner has standing in this action based upon both the Fourth and Fifth Amendments to the United States Constitution. The Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy. United States v. Chadwick, 433 U.S. 1 (1977). In general terms, the test to be applied to determine the reasonableness of the intrusion is whether the thing done, in the sum of its form, scope, nature, incidence, and effect impresses as being fundamentally unfair or unreasonable in the specific situation, when the immediate end sought is considered against the private right affected. Oliver v. United States, 239 F.2d 818 (8th Cir. 1957), cert. dismd. 353 U.S. 952.

In the instant case, the government's

seizure and use of Petitioner's statement was more than unreasonable - it was unlawful. Petitioner submits that based on the circumstances of this case he had every expectation of privacy in his testimony. First, he was forced to testify against himself and others; he was granted immunity from criminal prosecution for his testimony; he testified before a grand jury in Florida, with its stringent prohibitions against disclosure or use of grand jury testimony and with a state constitutional right of privacy. Fla. Const. Art. I, §12 (1982). Petitioner's expectation of privacy - based on his government's compliance with the law - was certainly legitimate, even if naive.

The Florida Constitution declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures

shall not be violated. Fla. Const., supra. And it cautions that information obtained in violation of this right is inadmissible in evidence. Id. Fla. Const. Art. I, §23, adopted in 1980 as an additional provision in the Declaration of Rights, provides that every natural person has the right to be let alone and free from governmental intrusion into his private life. Further, the Supreme Court of Florida has given fair warning that if Florida law enforcement officers engage in violations of the fundamental rights of Floridians, it will not hesitate to override their acts in favor of the rights conferred in Fla. Const. Art. I §12. Sheff v. State, 329 So. 2d 270 (Fla. 1976).

One of the landmark cases on the application of exclusionary principles in civil cases is Boyd v. United States, 116 U.S. 616 (1886), a forfeiture case

involving imported goods without payment of the customs duty. The question before the court was whether the compulsory production of a man's private papers for their evidentiary use against him in a civil proceeding constituted an unreasonable search and seizure within the meaning of the Fourth Amendment. The court held that proceedings seeking penalties or forfeitures, although technically civil, are in substance and effect criminal and therefore of a quasi-criminal nature and subject to exclusion. Similarly, in One 1958 Plymouth Sedan v. Commonwealth of Pa., 380 U.S. 698 (1965), Justice Black in a concurring opinion at page 703 stated since the Fifth Amendment specifically provides that "No person ... shall be compelled in any criminal case to be a witness against himself," use of coerced testimony in a quasi-criminal proceeding is

unconstitutional. The totality of the circumstances of this case - coerced testimony, immunity from criminal prosecution, violation of grand jury secrecy by the police and by IRS - certainly impresses as being fundamentally unfair to allow IRS to use Petitioner's forced statement against himself in a quasi-criminal proceeding. And particularly if the immediate end is to collect taxes and not punish Petitioner for his wrongdoing.

In Romanelli v. Comm. of Internal Revenue, 466 F.2d 872 (7th Cir. 1972), a case similar in circumstances to the instant case, the United States Tax Court ordered suppression in a civil suit of a taxpayer's statement which had been unlawfully obtained. The court stated at page 879 that it would be "unwholesome and an abuse of power" to allow law enforcement

officials to infringe upon Romanelli's Fifth Amendment constitutional protection against self-incrimination to the extent that the right to use his statement to establish a criminal charge was forfeited, but to award the advantage of using his statements in establishing civil liability. In this case, Petitioner was granted immunity from criminal prosecution in order to coerce his testimony, which incriminated himself and others. In the instant case, the government made the choice to break the law and accept and use Petitioner's statement, but now seeks to use that same forced statement - and nothing else - to punish Petitioner with civil liability. As with Romanelli, to allow this statement into evidence under these circumstances would be unwholesome and an abuse of power.

The District Court below, in keeping with the decision of the Fourth Circuit in

In Re: Grand Jury Subpoenas, April, 1987 at Baltimore, 581 F.2d 1103 (4th Cir. 1978), found that threat of contempt is sufficient deterrent for unauthorized disclosure. The very entity which supplied Petitioner's grand jury testimony to IRS and which committed a crime under Florida law is surely not likely to charge itself or its co-conspirator (IRS) in the commission of a crime. Footnote 16 at page 1110 of the opinion following the foregoing statement in In Re Grand Jury Subpoenas provides: "while we do not decide the issue, it may well be argued in an appropriate case that fairness would require exclusion of any evidence which had been improperly obtained from the grand jury."

This Court in its opinion in Janis, supra. specifically held that the judicially created exclusionary rule should

not be extended to forbid the use in a civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign. The rationale explained in this holding was that insufficient deterrent effect would be achieved by the exclusion of such evidence. This Court specifically noted at page 456 of its opinion the following:

> But Respondent does not critically distinguish between those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence, on one hand, and those cases, such as the present one, on the other hand, where the officer has no responsibility or duty to or agreement with the sovereign seeking to use such evidence.

In footnote 31 which follows, this Court stated:

> Respondent remains free on remand to attempt to prove that there was federal participation in fact. If he succeeds in that proof, he raises the question, not presented by this case,

> whether the exclusionary rule is to be applied in a civil proceeding involving an intra sovereign violation.

The instant case is the very case envisioned by this Court in the above discussion.

As stated by the United States Tax Court in Suarez v. Commissioner, 58 T.C. 792 (1972) at page 805:

> The costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established. Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal. Moreoever, we cannot ignore the additional factor that the integrity of the judicial process is also at stake. See Mapp v. Ohio, 367 U.S. 643, 659, 660 (1961); Elkins v. U.S., 364 U.S. 206, 222 (1960).

Anything short of denying the federal government the ability to utilize information, which both sovereigns knew to

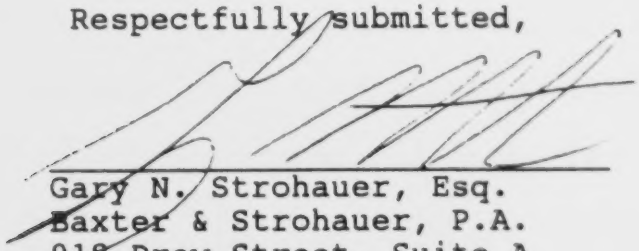
be illegally procured and the use of which constitutes a crime, renders perilous the supervisory powers of the court system and promotes unbridled future criminal activities by both state and federal law enforcement agents. The ends cannot justify the means. IRS should not be counseled and encouraged by the lower Court's determination to proceed to collect taxes by any conduct, lawful or unlawful, constitutional or unconstitutional.

By suppressing the government's use of Petitioner's grand jury testimony, the tax assessment in issue against Petitioner becomes a naked assessment without any foundation whatsoever. Helvering v. Taylor, 293 U.S. 507, (1935).

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued.

Respectfully submitted,



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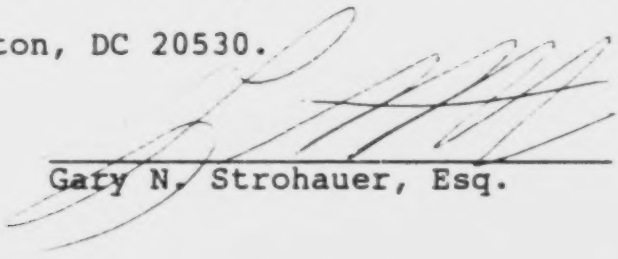
CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served including three true and correct copies served by U.S. Mail this 13th day of July, 1993, to the Solicitor General of the United States, Department of Justice, Washington, DC 20530.



Gary N. Strohauer, Esq.

APPENDIX A

Order of United States District Court for the Middle District of Florida dated June 22, 1992.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

FORT MYERS DIVISION

JOHN B. MATHES,

Plaintiff,

vs. CASE NO. 88-116-CIV-FTM-17

UNITED STATES OF AMERICA,

Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on the Motion for Summary Judgment filed by Plaintiff, the UNITED STATES GOVERNMENT, on February 14, 1992; on Defendant's Response or Alternatively, Cross Motion for Summary Judgment, filed by Defendant JOHN B.

MATHES, filed on March 25, 1992; Plaintiff's Opposition to Defendants Cross Motion for Summary Judgment, filed on April 8, 1992; and Defendant's Response to Plaintiff's Opposition, filed on April 29, 1992.

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. Sweat v. The Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-97, (5th Cir. 1979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir. 1969). Factual disputes

preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265, (1986):

> In our view the plain language of Rule 56(c) mandates the entry of a summary judgment after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

The Court also said, "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is

a genuine issue for trial."

I. STATEMENT OF FACTS

Prior to July 20, 1978, Defendant was subpoenaed to testify before the Florida Third Statewide Grand Jury. Defendant was granted immunity for testifying, but refused to testify. Predicated on that refusal, Defendant was incarcerated pursuant to an order of civil contempt issued by Judge MacDonald. The contempt order was open ended and Defendant was to remain in jail until he appeared and testified before the Third Statewide Grand Jury and answered questions put to him.

On July 20, 1978, outside the presence of the grand jury, the Defendant consented to give a sworn statement to an Assistant State Attorney, who was designated legal advisor to the grand jury. This sworn statement was later transcribed and an agent for the Internal Revenue Service

testified at trial that he received a copy of the sworn statement and was aware that the statement was grand jury testimony.

The Defendant admitted in this statement that he received $230,000 in 1977 from the sale of large quantities of marijuana. He did not file a tax return for the year 1977 and on October 2, 1981, the Commissioner of Internal Revenue issued a notice of deficiency asserting that Defendant owed federal income taxes plus additions to the tax for the year 1977 which included the $230,000 derived from the sale of drugs.

The Internal Revenue had no independent basis from Defendant's testimony for asserting that the Defendant had received the $230,000. Plaintiff neither applied for nor received an order from any court, federal or state, releasing Defendant's grand jury statement.

On January 6, 1982, Defendant filed a petition for redetermination of alleged deficiencies for the year 1977. The Tax Court dismissed the petition for redetermination on March 8, 1982 because the petition was not filed within the requisite 90 day time period. On November 27, 1985, Defendant filed for injunctive relief in this Court. On December 21, 1988, after a one-day trial, this Court dismissed the complaint and denied the request for injunctive relief.

On August 10, 1988, while Defendant's request for injunctive relief was pending, the U.S. Government filed a complaint to reduce Defendant's income tax liability to judgment.

Defendant filed a timely notice of appeal of the dismissal on January 19, 1989, with the Eleventh Circuit U.S. Court of Appeals. On September 20, 1988,

Defendant filed a Motion to Dismiss the government's action. This Court denied Defendant's motion on February 16, 1989.

On May 18, 1989, the undersigned granted Defendant's request to stay action on Government's complaint until resolution of Defendant's appeal for injunctive relief and on its Motion to Dismiss. On May 22, 1990, the appellate court affirmed the district court denial of injunctive relief and dismissal of the matter with prejudice but did not determine the validity of the 1977 tax assessment. The district court lifted the stay on March 5, 1991, following the appellate court's decision.

II. CONCLUSIONS OF LAW

Summary judgment is appropriate in this cause because no facts are in dispute. Both parties have filed pretrial stipulations in which they have admitted all of the above stated facts. As a

result, the parties are bound by the facts for the purposes of their summary judgment motions.

A. Validity of the Tax Assessment

Under Section 61 of the Internal Revenue Code the following amount was due for the period ending December 31, 1977:

Assessed Tax	$ 134,803.92
Assessed Penalties	83,845.89
Assessed Lien Fee	32.00
Assessed Interest	71,372.02
Accrued Interest to 2/1/92	564,137.86
TOTAL	$854,191.69

"Gross income" includes income from a trade or business, regardless of its lawfulness or its unlawfulness. C.I.R. v. Doyle, 231 F.2d 635 (7th Cir. 1956). The Internal Revenue Service determined that Mr. Mathes failed to include in his 1977 federal income taxes, income earned that year from sales of marijuana. The IRS assessed penalties accordingly.

IRS determinations of taxability and

assessments of penalty are presumptively correct. Welch v. Helvering, 290 U.S. 111, 115 (1933). Once the IRS issues a certificate of assessment, the certificate becomes prima facie evidence of the tax penalty liability, and the burden of proving that the assessment is incorrect is on the taxpayer. Deason v. C.I.R., 590 F.2d 1377, 1379 (5th Cir. 1979). Mr. Mathes therefore has the burden of proving the assessment was incorrect and the burden remains on him for the purposes of summary judgment. See Celotex Corp., 477 U.s. at 322. The court does not read **United States v. Baggot**, 463 U.S. 476 (1983) to hold that grand jury testimony is never the appropriate basis for IRS assessment. Instead, it holds that the appropriate time to issue a disclosure order is in conjunction with a judicial proceeding and not an administrative proceeding.

The court in Kluger v. C.I.R., 91 T.C. 969, 1988, held that a tax deficiency assessment based solely on grand jury testimony obtained pursuant to a court order was valid. The defendant failed to report income from the sale of narcotics. The court found that such a determination was not arbitrary. Thus grand jury testimony properly may provide a sufficient factual basis to support an IRS assessment.

B. Defenses

Defendant opposed the Government's motion for summary judgment and filed a counter-motion for summary judgment alleging that the Government's utilization of state grand jury testimony violates grand jury secrecy requirements violating federal common law privilege. The defendant contends this is analogous to a violation of the Fourth Amendment immunity against an illegal search and seizure and

that suppression of illegally obtained evidence is the appropriate remedy. Because district courts are required to consider the entire record while evaluating a motion for summary judgment, the Court must consider the defendant's contention to determine whether the IRS assessment is valid and enforceable.

1. Federal Common Law of Privilege

The privileged nature of state grand jury materials under state law is not controlling in determining whether materials are privileged in federal court. Federal common law is the source of such privilege. Because the Government's claim arises under federal law, a state statute holding such communications to be privileged is not controlling. Fed. R. Evid. 501; Carr v. Monroe Manufacturing, 431 F.2d 384, 387-88, (5th Cir. 1970), cert. denied, 400 U.S. 1000 (1971);

Socialist Workers Party v. Grubisic, 619 F.2d 641, 643 (7th Cir. 1980). The federal common law accords at least a qualified privilege to state grand jury proceedings. Florida grand jury proceedings are surrounded in secrecy and this state has, in its discretion, opted for the maximum possible amount of secrecy. Smith v. Butterworth, 678 F.Supp. 1552, 1561 (M.D. Fla. 1988). Although Florida has opted for the most stringent requirements, federal common law provides grand jury testimony a similar privilege of secrecy. Through their secrecy requirements, both state and federal statutes attempt to ensure the free deliberation by the grand jury, to prevent the escape of those under indictment, to prevent subornation of perjury, to encourage disclosure by witnesses and to protect the innocent from unwarranted exposure. Douglas Oil Co. v. Petrol Stops

Northwest, 441 U.S. 211, 218-19, (1979). Consequently, state grand jury material should be accorded the same amount of protection in federal courts that is accorded to federal grand jury materials. Socialist Workers party, 619 F.2d at 643. Federal courts evaluate the need for secrecy in the context of decisions by applying Fed.R. Crim.P. 6(e).

The testimony provided by Mr. Mathes is state grand jury testimony. Mathes v. U.S., Case No. 85-166-Civ-FTM-17. The grand jury testimony was provided to a vice detective with the St. Petersburg police department who, in turn, provided it to the IRS. It is possible that the Government could have obtained a disclosure order had it applied to the state court. Such disclosure is only allowed pursuant to an order by the state supervising court. The party seeking disclosure must show a

particularized need which outweighs the public interest in grand jury secrecy. Under Fla. Stat. section 905.27, the state court may, in its discretion, authorize disclosure to further the ends of justice. Nowhere does the statute authorize the use of such information by and administrative agency without applying for a disclosure order. Therefore, the IRS violated the Florida statute when it received the defendant's grand jury testimony, and knowingly used such testimony as the basis for a tax assessment without applying to the appropriate court for a disclosure order.

2. Exclusion of Evidence

The defendant argues that the use of this information without the appropriate disclosure order requires such evidence to be suppressed. However, neither state law, Fla. Stat. section 905.27, nor federal law,

Rule 6(e), Fed.R. Crim.P. require suppression of grand jury testimony which is obtained improperly. Under federal law "a knowing violation of Rule 6 may be punished as a contempt of court". Rule 6(e)(2)

The defendant contends that similar to Cohen v. Commissioner, 42 T.C.M. 312, 50 P-H Memo. T.C. par. 81, 901 (1981) suppression of the evidence pursuant to the courts supervisory powers is the appropriate remedy. Cohen involved an IRS violation of Rule 6(e), Fed.R. Crim.P., rather than the violation of a state secrecy requirements. However, the decision in Cohen was made in response to a series of intentional and flagrant violations extending over a period of many years. Consequently, the more severe sanction of excluding the evidence rather than charging criminal contempt was an

appropriate remedy. In contract, the IRS' use of such testimony in this instance is an isolated incident involving the violation of a state procedural statute.

The government argues that since the Supreme Court's decision in United States v. Janis, 428 U.S. 433 (1976) the exclusionary rule has not been applied in intersovereign violations. According to Janis, evidence illegally obtained by one sovereign for use in a criminal trial will not be excluded from use in a civil trial by a different sovereign. The government argues persuasively that the grand jury testimony obtained in violation of a state statute should not bar its use in a civil federal trial. The exclusionary rule seeks to deter illegal conduct and protect judicial integrity. However, the deterrent effect is marginal when the illegal conduct occurs on the state level and the sanction

is applied at the federal level.

Thompson v. U.S., 936 F.2d 1249 (11th Cir. 1991) involved a violation in the application to use a pen register. The court did not exclude evidence obtained by its use because a technical violation did not reach constitutional proportions. In U.S. v. Gilbert, 942 F.2d 1537 (11th Cir. 1991) federal agents participated in a state search in violation of the search warrant. The court held that the failure to designate the federal officers on the warrant again was only a technical violation and did not exclude the evidence seized under the warrant. Similarly, this Court finds that the government's failure to obtain the necessary disclosure order does not violate the defendant's constitutional rights because it is a technical violation. A disclosure order may be granted at the court's discretion to

further the ends of justice.

The government argues that the illegal action occurred at the state level and that the Government merely received the information. This argument is somewhat tenuous as it is the federal government who seeks to rely solely on this evidence in court in violation of state and federal statutes requiring disclosure orders. However, similar to Janis, this Court finds that the exclusionary sanction in a federal case will not provide the necessary deterrent effect to protect state grand jury secrecy requirements. Further, the magnitude of the violation is lessened with passage of time because the need for secrecy lessens. After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. United States v. Socony Vacuum, 310 U.S. 150, 234 (1940). Therefore, the Court

finds that exclusion of such evidence is not the appropriate remedy and the IRS tax assessment to be valid and enforceable.

CONCLUSION

The Court finds as a matter of law that Plaintiff has established the validity of the tax assessment and that violation of the state disclosure orders do not warrant the exclusion of grand jury testimony. Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment be GRANTED; final judgment in favor of Plaintiff, the United States of America, shall be ENTERED by the Clerk of the Court; and Defendant's request for summary judgment be DENIED.

DONE and ORDERED in Chambers, in Tampa, Florida this 22nd day of June, 1991.

/s/

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX B

Per curiam opinion of United States Court of Appeals for the Eleventh Circuit dated April 15, 1993.

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-2728

D.C. Docket No. 88-116-CIV-FTM-17D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN B. MATHES,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(April 15, 1993)

Before FAY, Circuit Judge, JOHNSON, Senior Circuit Judge, and
MERHIGE*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1

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*HONORABLE Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX C

Final Judgment of United States District Court for the Middle District of Florida dated November 6, 1992.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

FT. MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v. CIVIL NO. 88-116-CIV-FTM-179
JOHN B. MATHES,
Defendant,

FINAL JUDGMENT

This matter came to be heard upon plaintiff's motion for entry of judgment. Upon consideration of the plaintiff's motion, any opposition thereto, the pleadings and papers contained in the record, and being fully apprised of the premises, the Court finds that there is no just reason for delay and that entry of

judgment is appropriate. Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff United States of America shall recover on the claim against defendant John B. Mathes, the sum of $854,191.69 for the unpaid federal income tax liabilities for the 1977 tax year calculated to February 1, 1992, plus interest thereafter as set forth in 26 U.S.C. Sections 6621 and 6622; and it is further

ORDERED, ADJUDGED AND DECREED that the clerk shall enter judgment in favor of the United States accordingly.

DONE AND SO ORDERED this 6th day of November, 1992, at Tampa, Florida.

s/ Elizabeth A.Kovachevich
UNITED STATES DISTRICT JUDGE

cc: Mary Apostolakos Hervey, Esq.
Gary Strohauer, Esq.

APPENDIX D

Memorandum Opinion of United States District Court for the Middle District of Florida dated December 21, 1988:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOHN B. MATHES,

Plaintiff,

vs. CASE NO. 85-166-CIV-FTM-17

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

This matter came on for trial on October 3, 1988, before this Court sitting without a jury. At trial, Plaintiff proffered Plaintiff's exhibit 7. Plaintiff's exhibit 7 is hereby admitted into evidence. After consideration of the testimony, exhibits, pre-trial stipulation,

and arguments of counsel, the Court makes the following findings of fact and conclusions of law. To the extent that any of the findings of fact might constitute conclusions of law, they are adopted as such. Conversely, to the extent any conclusion of law constitutes a finding of fact, they are adopted as such.

FINDINGS OF FACT

1. Prior to July 20, 1978, Plaintiff was subpoenaed to testify before the Florida Third Statewide Grand Jury. Plaintiff was granted immunity for testifying, but refused to testify. Predicated on that refusal, Plaintiff was incarcerated pursuant of an order of civil contempt issued by Judge McDonald.

2. The contempt order was open ended and Plaintiff was to remain in jail until he appeared and testified before the Third Statewide Grand Jury and answered questions

put to him.

3. On July 20, 1978, Plaintiff, with his consent, appeared before Myron Mensh, Assistant State Attorney and designated legal advisor for the Third Statewide Grand Jury. Present at this meeting also were Doug Keith, Everett Rice and Debbie Winter. This meeting did not occur in front of the Grand Jury, but took place at the Pinellas County Jail.

4. In that question and answer session, Plaintiff acknowledged that he desired to purge himself of the contempt and gave a statement under oath to satisfy the requirement that he wished to appear before the Third Statewide Grand Jury and answer the questions put to him. Plaintiff, at that time, answered all questions pout to him by Mr. Mensh, Mr. Rice and Mr. Keith.

5. Subsequent to the July 20, session

Plaintiff testified before the Third Statewide Grand Jury and was examined by Myron Mensh. Plaintiff states that his testimony in front of the grand jury was substantially the same as the statement given on July 10, 1978.

6. A copy of the transcription of the question and answer session of July 20, 1978, came into the hands of agents for the Internal Revenue Service (IRS). The transcript was apparently provided to the IRS by a vice detective with the St. Petersburg Police Department. (Transcript, pgs. 30-31). The agent receiving the information was aware of the circumstances surrounding the taking of the statement in question.

7. In his sworn statement, Plaintiff admitted to the receipt of two hundred thirty thousand dollars ($230,000.00) in income derived from the sale of 23,000

pounds of marijuana in or about November 1977.

8. Plaintiff does not have any records relating to his expenses incurred in earning the $230,000.00.

9. Plaintiff did not file a tax return for the year 1977.

10. On or about October 2, 1981, after receiving the transcript, the District Director of the IRS issued a Statutory Notice of Deficiency to Plaintiff for taxes in the amount of one hundred fifty-six thousand five hundred dollars and fifty cents ($156,500.50) and a fraud penalty in the amount of eighty three thousand eight hundred forty five dollars and eighty nine cents ($83,845.89) for the year 1977.

11. On August 12, 1982, the assessed taxes, penalties, and interest against Plaintiff was three hundred eleven thousand

seven hundred sixty-nine dollars and forty one cents ($311,769.41). The portion of the assessment regarding the $230,000.00 income was based on the transcript of the July 20, 1978, statement. The remainder of the assessment regarding income received from sources other than the unlawful transaction was based on other information.

12. Plaintiff does not challenge the portion of the assessment regarding the income earned, by other than illegal means, in the amount of fourteen thousand nine hundred and ten dollars ($14,910.00).

13. Plaintiff has paid to the IRS, as a result of their affirmative collection activities, twenty one thousand seven hundred and forty six dollars (21,746.58) toward satisfaction of the taxes, penalties, and interest for the year 1977. This amount of payment more than extinguished any liability in regard to the

$14,910.00 in income.

14. On January 6, 1982, Plaintiff filed a petition in the United States Tax Court to redetermine his deficiency for the year 1977, in Case No. 506-82. The tax court dismissed the petition as being untimely filed on March 8, 1982.

15. Plaintiff's testimony established that 1) he is married and has two (2) minor children; 2) he owns an undeveloped lot in north Florida and a one-half interest in an office building; 3) he is the owner of a forty nine percent (49%) interest in Mathes Realty, Inc., which is his sole source of income; 4) he has been unable to borrow money to build a home or to provide capital for his business nor has he been able to sell his interest in the office building because of the tax lien; 5) he has been unable to borrow money to engage in his previous business of real estate

development; and 6) a Federal Tax Lien was recorded in the public records of Lee County, Florida on March 22, 1983, and refiled June 23, 1988, and constitutes a lien on all assets owned by Plaintiff.

CONCLUSIONS OF LAW

1. The sole issues in this cause of action is whether the tax assessment for the year 1977, pertaining to income received from an illegal source, is valid and enforceable. Plaintiff seeks to enjoin the collection of the taxes assessed against him for the year of 1977.

2. Plaintiff asserts that Section 905.27, Florida Statutes (1978), renders the tax assessment on the $230,000.00 income invalid and unenforceable. Section 905.27 states:

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not

disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when the testimony is or has been disclosed in a court proceeding. When a court orders disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney or the court in which the criminal case is pending, and by him to his assistants,

> legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

3. Section 905.27, Fla. Stat., is more stringent than the Federal Secrecy Statute (Rule 6e). Florida, within its discretion, has opted for maximum possible secrecy. Smith v Butterworth, 678 F.Supp. 1552, 1561 (M.D. Fla. 1988).

4. The question before the Court is whether or not injunctive relief is available to Plaintiff. In general injunctive action is not available against the IRS. 26 U.S.C. s7421(a).

5. If the taxpayer can prove that it is clear that under no circumstances could the Government ultimately prevail and if equitable jurisdiction otherwise exists, the taxpayer shows that he would otherwise suffer irreparable injury and he has an inadequate remedy at law, then an injunction may be granted. Commissioner v Shapiro, 424 U.S. 614, 96 S.Ct. 1062, 47 L.Ed. 2d 278 (1976); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, at 7, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962).

6. The question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. "Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." Enochs, at 7.

7. Section 905.27, Fla. Stat., prohibits the disclosure of testimony of one "examined before the grand jury" and its purpose is to insure the secrecy of grand jury proceedings. Generally, matters before a grand jury are those matters which reveal or tend to reveal what transpired during grand jury proceedings and to compromise the secrecy of the grand jury. See, U.S. v Phillips, 843 F.2d 438 (11th Cir. 1988).

8. It is the aim of Rule 6 to prevent disclosure of the way in which information was presented to the grand jury, the specific questions and inquiries of the grand jury, their deliberations and vote of the grand jury, the targets upon which the grand jury's suspicion focuses, and specific details of what took place before the grand jury. In Re Grand Jury Investigation of Ven-Fuel, 441 F. Supp.

1299, 1303 (M.D. Florida, 1977). As to information gained outside the grand jury proceedings, the disclosure of information obtained from a source independent of grand jury proceedings does not violate Rule 6(e). In Re Grand Jury Investigation - Lance, 610 F.2d 202 (5th Cir. 1980).

9. The Q&A statement is grand jury material because it reveals the minute particulars of the drug transaction from which Plaintiff derived income. It gives names, dates and places. The statement reveals the targets of the grand jury investigation.

10. The Q&A statement is not information gained from a source independent of the grand jury because it was given by Plaintiff in order to purge himself of the contempt citation for refusal to appear before the Third Statewide Grand Jury. The statement was

taken by Mensh within the scope of his duties as legal advisor to the grand jury. Anyone reading the Q&A would have been made aware of the connection of the statement with the grand jury proceedings.

11. Assuming a disclosure order should have been obtained pursuant to F.S. 905.27, the remedy for failure to obtain such an order is not necessarily suppression of the information disclosed. The normal remedy for violation is a finding of criminal contempt of court.

12. If a disclosure order had been sought, the Court does not read United States v. Baggot, 463 U.S. 476 (1983) to require the state judge to refuse to grant the disclosure order. In Baggot, the Supreme Court held that disclosure under Rule 6(e) was not permitted because the investigation for determination of civil tax liability is not preliminary to or in

connection with a judicial proceeding.

13. In deciding whether to order disclosure of grand jury material under Florida statute, the judge would have first determined whether it is statutorily permitted. Disclosure is permitted to ascertain whether the testimony is consistent with the testimony of the witness before the court, to determine whether the witness is guilty of perjury, or for furthering justice. The Florida statute does not require the disclosure to occur in connection with or preliminary to a judicial proceeding.

14. The term "furthering justice" allows the judge some discretion because it may be interpreted narrowly, to mean for use in a court proceeding, or it may be interpreted broadly, to mean achieving a just end and furthering the search for truth. In Smith v. Butterworth, 678 F.

Supp 1552 (M.D. Fla. 1988), where a reporter sought to publish a book revealing his testimony before a Florida grand jury after the conclusion of the proceedings, Defendant Butterworth argued that the Florida statute was constitutional because under the present scheme disclosure of the testimony could have been obtained.

15. The traditional policies for preserving the secrecy of grand jury material are set forth in Douglas Oil v. Petrol Stops, 441 U.S. 211, 219 (1979). After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. United States v. Socony Vacuum, 310 U.S. 150, 234 (1940).

16. Plaintiff has not shown with absolute certainty that disclosure could not have been obtained, had a disclosure order been sought.

17. Plaintiff may not maintain his

suit to enjoin the United States of America from collecting the taxes assessed against him for the year 1977. The Court finds the tax assessment for the year 1977 to be valid and enforceable. Accordingly, it is

ORDERED that the Clerk of the Court shall enter a final judgment in favor of Defendant, the United States of America, denying Plaintiff's request for a permanent injunction enjoining the United States of America from collecting taxes assessed for the year 1977, and dismissing this cause of action with prejudice.

DONE and ORDERED in Chambers, in Tampa, Florida this 21st day of December, 1988.

s/_____
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX E

Florida Statutes 905.27. Testimony not to be disclosed; exceptions

(1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the

case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.

(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.083, or by fine not exceeding $5,000, or both.

(5) A violation of this section shall constitute criminal contempt of court.